SAINT LOUIS UNIVERSITY LAW JOURNAL
1992 HEALTH LAW SYMPOSIUM

Vol. 36, No. 4 Summer 1992

THE MALPRACTICE CRISIS OF 1995
Prologue

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IN the mid-1970s and, again, in the mid-1980s we experienced medical malpractice crises. Both manifestations led to accusations and recriminations and to statutory retrenchment. The crisis of the mid-1980s was further distinguished when heralded thereafter as a mature liability insurance or torts crisis.

Few other crises of such importance and high visibility[1] have so struggled over the fundamentals; were they real, imagined, or manufactured,[2] who[3] or what[4] caused them or if, let alone how, they could be

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1. The LEXIS/NEXIS search "malpractice w/5 crisis" performed on November 21, 1992 yielded 151 law review articles (LAWREV/ALLREV), 294 state cases (MEDMAL/OMNI), 61 federal cases (GENFED/OMNI), and 55 medical journal articles (MEDIS/GENMED/JNLS). A more discrete search of "malpractice crisis" returned a massive 669 newspaper, news agency and magazine references (NEXIS/OMNI).

2. *See, e.g.*, Croley & Hanson, *What Liability Crisis? An Alternative Explanation for Recent Events in Products Liability*, 8 YALE J. ON REG. 1 (1990); Reske, *Was There a Liability Crisis?* 75 A.B.A. J. 46 (Jan. 1989). Consider also the findings of the Minnesota Insurance Commissioner who studied *all* claims filed during a six-year period with the leading malpractice carriers in Minnesota, South Dakota and North Dakota. His report concluded:

averted? Nationwide, reactive crisis legislation routinely has been enacted,[5] only occasionally exhibiting novel approaches to the problem of

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▸The frequency of claims per year has not materially changed over the six year period.

▸The severity of the claims payment has not materially changed over the six year period.

▸Fewer than *one-half of one percent* of all malpractice claimants are awarded damages by a jury. Most important, this figure has remained constant over the period of the study.

▸Claims determined by the insurer to be frivolous have not increased over the past six years.

▸The likelihood of receiving compensation as a result of filing a malpractice claim is approximately 25 percent. This rate has not materially changed over the period of the study.

▸No punitive damages were found to be awarded against a physician.

▸The average cost of investigation and defending a claim has changed little in the last six years. Indeed, the amount appears to be decreasing; and

▸Despite unchanging claims frequency and declining loss payments and loss expense, on average, physicians paid approximately triple the amount of premiums for malpractice insurance in 1987 than in 1982.

MEDICAL MALPRACTICE CLAIM STUDY — 1982-87, at 31.

3. *See generally* Terry, *The Malpractice Crisis in the United States: A Dispatch from the Trenches*, 2 PROF. NEGL. 145, 148 (1986).

4. One of the most telling assaults on the torts system itself in this regard comes from Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521 (1987):

> [T]he characteristic of contemporary tort law most crucial to understanding the current crisis is the judicial compulsion of greater and greater levels of provider third-party insurance for victims. The progressive shift to third-party corporate insurance coverage, since its beginnings in the mid-1960's, has systematically undermined insurance markets. The decline in interest rates within the past two years has led the most fragile of these markets — those for which third-party coverage is least supportable — to collapse. The collapse is signaled by the accelerating conversion to self-insurance. This conversion, in turn, forces insurers to exact drastic premium increases, as well as to restructure the terms of the basic insurance policy, in order to salvage a market among remaining insureds. Where these salvage efforts have proven unsuccessful, insurers have refused to offer coverage altogether.
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> This explanation of the crisis uncovers what I believe to be a tragic paradox of our modern civil liability regime. The expansion of liability since the mid-1960's has been chiefly motivated by the concern of our courts to provide insurance to victims who have suffered personal injury. The most fundamental of the conceptual foundations of our modern law is that the expansion of tort liability will lead to the provision of insurance along with the sale of the product or service itself, with a portion of the

professional liability,[6] and often involving more symbolism than substance.[7] Such legislation, usually by lowering the settlement value of large classes of cases, but often because of not inconsiderable confusion as to the effect of its reforms, chills the very litigation it apparently sought to streamline. And, almost inevitably the passage of such legislation adds an additional, constitutional level of scrutiny, with all its attendant delays,[8] to the already muddied waters.[9]

> insurance premium passed along in the product or service price. Expanded tort liability, thus, is a method of providing insurance to individuals, especially the poor, who have not purchased or cannot purchase insurance themselves. This insurance rationale suffuses our modern civil law, and must be acknowledged as one of the great humanitarian expressions of our time.
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> The paradox exposed by my theory is that the expansion of tort liability has had exactly the opposite effect. The insurance crisis demonstrates graphically that continued expansion of tort liability on insurance grounds leads to a reduction in total insurance coverage available to the society, rather than to an increase. The theory also shows that the parties most drastically affected by expanded liability and by the current insurance crisis are the low-income and poor, exactly the parties that courts had hoped most to aid. (footnotes omitted).

Id. at 1524-25.

This thesis is strongly challenged by Croley & Hanson, *What Liability Crisis? An Alternative Explanation for Recent Events in Products Liability*, 8 YALE J. ON REG. 1. 28-51 (1990). Priest responds in Priest, *Can Absolute Manufacturer Liability be Defended?*, 9 YALE J. ON REG. 237 (1992).

5. *See generally* Bovbjerg, *Legislation on Medical Malpractice*, 22 U.C. DAVIS L. REV. 499 (1989).

6. *See, e.g.*, Virginia Birth-Related Neurological Injury Compensation Act, VA. CODE ANN. § 38.2-5000 *et seq.* (1989); FLA. STAT. ANN. § 766.301 (West Supp. 1990). A more traditional interaction between medical and legal standard-setting also shows promise, see Havighurst, *Practice Guidelines for Medical Care: The Policy Rationale*, 34 ST. LOUIS U. L.J. (1990); Leahy, *Rational Health and the Legal Standard of Care: A Call for Judicial Deference to Medical Practice Guidelines*, 77 CAL. L. REV. 1483 (1989). For discussion of the more limited activity at the federal level see Adler, *Stalking the Rogue Physician: An Analysis of the Health Care Quality Act*, 28 AM. BUS. L.J. 683 (1991); Note, *Preventing Patient Dumping: Sharpening the Cobra's Fangs*, 61 N.Y.U. L. REV. 1186 (1986).

7. *See, e.g.*, Terry, *Missouri's Malpractice Concord*, 51 MO. L. REV. 457-90 (1986); Terry, *Retreat and Reaction: An Analysis of the Tort Reform Act*, 56 U.M.K.C. L. REV. 205 (1988).

8. For example, the Missouri "affidavit of expert" provision enacted in §

The torts system does seem to have weathered a surprising number of the storms of the last two decades, although legislative retrenchment appears to have inspired a new bout of judicial reconsideration of some aspects of modern tort law.[10] However, "survival" can in no way be used to predict the future of our current methods of providing and funding medical care. Ever-increasing public dissatisfaction has transformed a stale political debate into a non-partisan pledge of reform. Yet, it is obvious that neither politics nor practicalities[11] will allow the design of the health care system that will take us into the next century[12] to proceed without a clearer sense of the role of malpractice litigation and without malpractice experts further informing the debate.[13]

538.225 MO. REV. STAT. (1986), was finally judged as not violative of plaintiffs' constitutional rights in Mahoney v. Doerhoff Surgical Services, Inc., 807 S.W.2d 503 (1991). No other provisions of the statute have yet been passed on. In California it took four California Supreme Court decisions to determine the validity of that state's 1975 Medical Injury Compensation Act. *See* American Bank & Trust Co. v. Community Hospital, 683 P.2d 670, 204 Cal. Rptr. 671 (1984), Barme v. Wood, 689 P.2d 446, 207 Cal. Rptr. 816 (1984), Roa v. Lodi Medical Group, Inc., 695 P.2d 164, 221 Cal. Rptr. 77 (1985), Fein v. Permanente Medical Group, 695 P.2d 665, 211 Cal. Rptr. 368 (1985). *Fein*, 106 S. Ct. 214 (1985), and *Roa*, 106 S. Ct. 421 (1985), almost made it to the Supreme Court of the United States, the latter case attracting two dissents from the dismissal of the appeal.

9. *See, e.g.*, Morris v. Savoy, 61 Ohio St. 3d 684, 576 N.E.2d 765 (1991); King v. Virginia Birth-Related Neurological Injury Compensation Program, 242 Va. 404, 410 S.E.2d 656 (1991); Coy v. Florida Birth-Related Neurological Injury Compensation Plan, 1992 Fla. LEXIS 210 (1992).

10. Take, for example, the pathbreaking work of the Supreme Court of California in evolution of products liability doctrine. Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 27 Cal. Rptr. 697 (1963), and Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 104 Cal. Rptr. 433 (1972), led to the leading case of Barker v. Lull Engineering Co., 20 Cal. 3d 413, 143 Cal. Rptr. 225, 239 (1978). However, in the last few years, Brown v. Superior Court, 44 Cal. 3d 1049, 245 Cal. Rptr. 412 (1988), and Anderson v. Owens-Corning Fiberglas Corporation, 53 Cal. 3d 987, 281 Cal. Rptr. 528 (1991), have evidenced some deeply felt unease with those well-respected authorities.

11. *See, e.g, Hearing of the House Ways and Means Committee, Health Care Cost* (Testimony of Louis Sullivan, Director, HHS) Federal News Service, Oct. 10, 1991; Riley, *Huge Awards in Medical Malpractice Suits Called Chief Culprit*, THE WASHINGTON TIMES, Jan. 26, 1992, A15.

12. *See generally* Donald O. Nutter, MD; Charles M. Helms, MD, PhD; Michael E. Whitcomb, MD; W. Donald Weston, MD, *Restructuring Health Care in the United States; A Proposal for the 1990s*, 265 JAMA 2516-20 (May 15, 1991); Hudson, *Oregon and Massachusetts: A Tale of Two Reform Plans*, 65 HOSPITALS 13, 52-54 (1991).

13. *See, e.g.*, Rosenblatt, *Medicaid Primary Care Case Management, the Doctor-Patient Relationship, and the Politics of Privatization*, 36 CASE W. RES. L. REV.

This symposium, which brings together four of those experts, successfully challenges the malpractice crisis cycle of inaction-crisis-reaction.[14] Walter Wadlington, in his article *A Medical Malpractice Crisis in 1995? Some Conceivable Scenarios*, speculates on the possible plots that would lie behind the next heralded crisis, and suggests a series of strategies we should be developing in advance. John Blum, in *Hospitals, New Medical Practice Guidelines, CQI, and Potential Liability Outcomes*, concentrates on the impact of practice guidelines and objective outcome measures as they refresh the not always coincident legal and medical views of what constitutes malpractice. Troyen Brennan, in *Empirical Analysis of Accidents and Accident Law: The Case of Medical Malpractice Law*, melds empirical data and tort theory to further develop his ongoing work with the Harvard Medical Malpractice Study, and its stunning finding of malpractice victim *under* claiming. Peter Budetti, in *Malpractice and Access to Health Care*, views the malpractice issue from the broader perspective of the health system debate, and questions the link between litigation or feared litigation and the access problems we currently face.

Acknowledgments

We were indeed fortunate to be able to bring together these outstanding scholars and to experience their different perspectives. Additionally, the faculty members involved salute the imagination and hard work of JOURNAL Editors Lori Hootman, Diane Hoelzl, and Guy Gosnell, and the unflagging energy and organizational skills of Mary Anne Jauer, the secretary to the Health Law Center.

915 (1986); Morreim, *Cost Containment and the Standard of Medical Care*, 75 CALIF. L. REV. 1719 (1987).

14. The choice of 1995 was less the product of the collective clairvoyance of the contributors to the symposium, and more a metaphor for the apparent cyclical nature of these crises. In fact malpractice rates are predicted to be considerably higher as early as 1993. *See Medical Malpractice Insurance Cost Should Be on the Rise Again in 1993*, THE BOSTON GLOBE, April 2, 1992, at 45.